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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-744

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

SAMUEL SHAPIRO and BELLA SHAPIRO,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 7421(a) of the Internal Revenue Code authorizes the Internal Revenue Service to seize all of a taxpayer's assets in the United States, without prior notice and demand, one business day before he is extradited to a foreign country and then to refuse to provide to a district court the minimal factual support needed to demonstrate that the seizure, based on a jeopardy assessment, was not arbitrary and capricious.

STATEMENT

On Sunday, December 9, 1973, respondent Samuel Shapiro was scheduled to leave the United States – presumably forever – pursuant to an agreement under which he had withdrawn his challenge in this Court to the validity of an extradition request by the Government of Israel. During his stay in the United States of more than three years, there had never once been the slightest suggestion to him by IRS officials that his tax returns were not in complete order. Yet on the afternoon of Thursday, December 6, 1973, the IRS, without any notice or demand for payment from Shapiro (and, indeed, in a manner which appeared to be designed to keep the information from him until after he had departed the United States) served levies on banks holding his funds pursuant to a jeopardy assessment. More than two weeks later – after respondent instituted the present action in the district court and obtained a court directive that interrogatories be answered – the IRS first disclosed to the respondent that it was making this claim because it believed him to be "a dealer in narcotics." Respondent unequivocally denied the allegation in a Tax Court petition as well as in an affidavit filed some time later in the district court.

Since all his funds were tied up by these levies, respondent feared that he would be unable to raise the funds needed for bail and would be jailed in Israel if he returned there. This action sought the lifting of the levies and the jeopardy assessment on the ground that they were totally without basis in fact. The complaint alleged that respondent would suffer irreparable harm if he were jailed in Israel or if he were unable to be in the United

States to challenge the validity of the jeopardy assessment. The district court granted the government's motion to dismiss. But the court of appeals reversed that judgment. Relying on decisions of the Fifth and Second Circuits in *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973) (*en banc*) and *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969), the court below held that the respondent was entitled to engage in discovery to determine whether the assessment was arbitrary and capricious, that the distirct court might compel the IRS to provide some factual support for the tax claim, and that the assessment and levies could be enjoined if they were "so arbitrary and excessive as to be an exaction in the guise of a tax." That decision is here under review.

Most of the Petitioner's Statement (Pet. 5-9) is devoted to a recitation of what happened in the district court *after* remand by the court of appeals. These events, we submit, are not strictly relevant to the validity of the decision for which review is sought. One reason why they are even available at this juncture for inclusion in the petition is the extraordinarily dilatory tactics engaged in by the IRS since the May 15 decision of the court of appeals. By filing a petition for rehearing and seeking stays in the court of appeals and in the district court, and by obtaining a full 60-day extension of the time to petition for certiorari, the IRS has already managed to keep Mr. Shapiro's assets frozen far beyond the time needed for even leisurely judicial examination. The present petition extends the delay even further. As a result of the government's filing this petition, the IRS has obtained from the court of appeals a stay of the proceedings (See Appendix

1a, *infra*), thereby preventing the discovery process ordered by the district court from going forward.[1]

ARGUMENT

1. The Solicitor General asserts that the respondent's suit violates the Anti-Injunction Act, Section 7421 of the Internal Revenue Code, which bars any "suit for the purpose of restraining the assessment or collection of any tax." But respondent's contention – as the court of appeals properly observed – was that the IRS was not engaged in tax-collection when it seized his property, but only in obtaining "an exaction in the guise of a tax." This is a critical distinguishing feature between this case (along with *Lucia* and *Pizzarello*) on the one hand, and this Court's recent decisions regarding suits by tax-exempt organizations. In *Bob Jones University v. Simon*, 94 S.Ct. 2038, *Alexander v. "Americans United," Inc.*, 94 S.Ct. 2053, and *United States v. American Friends Service Committee*, No. 73-1791, decided October 29, 1974, the judicial relief requested was an injunction against collection of taxes from organizations which had previously enjoyed exempt status. No one claimed that the funds to be collected were not taxes; the only issue was the motive for

[1] The petition implies that on remand the district court was about to rule that the IRS' showing was insufficient and that the assessment was, therefore, invalid (Pet. 8-9). This demonstrates the danger of relying on proceedings that occurred *after* the decision sought to be reviewed as a basis for deciding whether review should be granted. In fact, the district court, on December 18, 1974, issued an order directing an accelerated discovery schedule (Appendix, pp. 3a-4a), and did not invalidate the assessment. What the court would do if no other information is produced by either side is presently uncertain.

which IRS was seeking such collection. As to that, the Court applied Section 7421. But when the purported unilateral and *ex parte* "assessment" or "collection" is not an action that places a taxpayer on a par with all others, but is a seizure of all or a substantial portion of his assets, it is questionable – if not plainly unconstitutional – to say that he has no remedy whatever, but must sit by while his Tax Court case winds it way through the administrative tribunal.[2]

2. The position taken by the court of appeals is consistent with that taken by two other circuits which have recently considered similar abuses by the IRS in using its extraordinary "jeopardy assessment" power as part of the IRS drive against those it believes guilty of narcotics or gambling violations.[3] Interestingly enough, while the

[2] Respondent in this case filed a Tax Court petition within two weeks of service on him of the deficiency notice. Rather than expediting its response to resolve the underlying question whether Mr. Shapiro was a narcotics dealer while he was still in the United States and able to defend himself, the IRS took 30 days to file a one-page answer to his petition. Thereafter, respondent sought an immediate trial in the Tax Court, again hoping to confront his accusers before he was expelled from the United States. *The IRS objected*, and a trial date was deferred until after the summer of 1974. By that time, the decision below had been announced and the respondent had been extradited. Pleadings are now being filed in the Tax Court to consider how to deal with a case involving such an allegation of criminality in the forced absence of the taxpayer, although the situation would not have arisen if the IRS had been willing to expedite a trial.

[3] *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969); *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973); see also *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974); *Sherman v. Nash*, 488 F.2d 1081 (3rd Cir. 1973).

Solicitor General asserts that the decision below conflicts with this Court's rulings regarding tax exempt organizations, the government's brief cannot cite a single case by a court of appeals in the area of jeopardy assessments which sustains its sweeping position that what IRS does when it seizes all a taxpayer's assets on the basis of a unilateral determination of illegal activity is totally immune from judicial examination. Such a proposition jeopardizes the security of all Americans; it places their property entirely at the mercy of an IRS bureaucrat who need only secure the approval of a higher-up for his unsubstantiated allegations to effect a total confiscation of a citizen's assets.

To say, as the government has been saying throughout this litigation, that a taxpayer may pursue his remedy in the Tax Court is to remit him to extended trial procedures – not subject to expedition even in emergency situations (see note 2, *supra*) – while his assets are taken and held by the IRS. The difficulties of finding lawyers when a taxpayer has no money to pay them and of enduring a time when all one's assets are frozen make this a situation where both liberty and property are being denied without due process of law. And when, as is true here, the taxpayer is not even permitted to be in the United States to challenge the criminal allegations made against him and the deprivation of his property raises the possibility that he will be imprisoned abroad, some form of judicial relief is required.

The Solicitor General simply misstates the holding of the court below when he says that the court required the IRS "to prove the facts upon which a tax assessment is based" (Pet. 2). The burden of proof, even on the most favorable reading of the decision below, remains on the

taxpayer. But once he denies the alleged illegal activity, as respondent did here, the IRS must come forward with *some* "factual support" for its assessment. In both *Pizzarello* and *Lucia*, it was conceded that the taxpayer had engaged in illegal gambling; the only issue was whether a "projection" of gambling revenues was arbitrary. In this case, there is no concession of illegality whatever, and at least the same problem exists with respect to any "projection" as existed in *Pizzarello* and *Lucia*. Indeed, this Court could probably take judicial notice of the fact that a gambling operation is more likely to be a continuing business returning constant weekly revenues than is the sale of narcotics. The distinctions between this case and *Pizzarello-Lucia* all establish that the decision below follows, *a fortiori*, from those in *Lucia* and *Pizzarello;* the Solicitor General's attempted distinctions are unsound on their face (Pet. 13-14).

3. Finally, we think a practical consideration is in order in determining whether to grant the Commissioner's petition. The decision was rendered on May 14, 1974, and a delay of more than two months resulted from the filing of a petition for rehearing. Still, had the Solicitor General filed his petition for certiorari by October 15, 1974, this case could be heard and decided (if certiorari were granted) during the current Term. As a result of extraordinary delay by the government, the petition was not filed until seven months after the decision came down, and the result is that even if certiorari is now granted, the case cannot be heard until the 1975 Term. During all this time, respondent's funds will be tied up, if not depleted, by attorneys' fees in the Tax Court action and in this

suit.[4] Thus, even if the government loses this battle, it will win the war by proving to taxpayers that a challenge to a jeopardy assessment is so expensive, time-consuming, and aggravating that it is not worth the effort. That, we submit, is not what vindication of legal rights is about.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] The amount seized totals approximately $55,000 and a real property levy was filed on a home owned jointly by Mr. & Mrs. Shapiro. During the hearing before Judge Richey on November 12, 1974, respondents' counsel introduced outstanding bills approximating $30,000.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2260 **September Term, 1974**

Civil Action 2172-73

Samuel Shapiro
Bella Shapiro,
Appellants

v.

Secretary of State, *et al.*

Before: Fahy, Senior Circuit Judge; Levanthal and Robinson, Circuit Judges

ORDER

The Clerk is directed to file appellees' for stay of proceedings in the District Court, and on consideration thereof, it is

ORDERED by the Court that appellees' aforesaid motion for stay is granted.

The Clerk is directed to transmit a certified copy of this order to the Clerk of the District Court as promptly as the business of his office permits.

Per Curiam

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2260 **September Term, 1974**
Civil Action 2172-73

Samuel Shapiro
Bella Shapiro,
Appellants

v.

Secretary of State, *et al.*

Before: Fahy, Senior Circuit Judge; Levanthal and Robinson, Circuit Judges

ORDER

IT IS ORDERED by the Court, *sua sponte*, that the Clerk of the District Court is directed to return the certified copy of this Court's judgment forthwith.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL SHAPIRO, *et al.*, *Plaintiffs*,
v.
SECRETARY OF STATE, *et al.*, *Defendants*.

Civil Action No. 2172-73

ORDER

Upon consideration by this Court of the factual submission submitted by the defendants in response to this Court's order of October 25, 1974, and of the arguments of counsel and evidentiary submissions made during a hearing held on November 12, 1974, and of the defendants' "Response to Court Inquiry" filed on November 18, 1974, and for the reasons set forth in the oral opinion of this Court rendered on December 17, 1974, it is by this Court, this 18th day of December, 1974

ORDERED AND DECREED:

1. That the parties be permitted to engage in pretrial discovery as provided in the Federal Rules of Civil Procedure, such discovery to end not later than Jaunary 31, 1975;

2. That, pursuant to the agreement of the attorneys for the defendants in open court on December 17, 1974, the defendants shall respond not later than 10 days after

APPENDIX C

receipt of the service of plaintiffs' interrogatories to such interrogatories, provided that such interrogatories are served not later than January 10, 1975, and provided further that the defendants may apply for an extension of time for good cause; and

3. That the defendants' Motion for Stay of Proceedings filed on December 16, 1974, be, and the same hereby is, denied.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES
DISTRICT JUDGE

DATED: December 18, 1974